

NA 05-0121-C H/H Lord v Barnhart
Judge David F. Hamilton

Signed on 6/27/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

STEFANIE LORD,)	
)	
Plaintiff,)	
vs.)	NO. 4:05-cv-00121-DFH-WGH
)	
JO ANNE B.)	
BARNHART, COMMISSIONER OF THE)	
SOCIAL SECURITY ADMINISTRATION,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

STEFANIE LORD,)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 4:05-cv-0121-DFH-WGH
)	
JO ANNE B. BARNHART,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	

ENTRY ON JUDICIAL REVIEW

Plaintiff Stefanie Lord seeks judicial review of a final decision by the Commissioner of Social Security denying her application for disability insurance benefits. Acting for the Commissioner, an Administrative Law Judge (“ALJ”) determined that Ms. Lord was not disabled under the Social Security Act because she retained the residual functional capacity to perform past relevant work as a general office clerk. Ms. Lord claims that substantial evidence does not support the ALJ’s decisions that she was not fully credible and that she could perform a significant range of work. For the reasons explained below, the ALJ’s decision is supported by substantial evidence for the period before November 2003. Ms. Lord’s claim must be remanded, however, for reconsideration of the medical records beginning November 6, 2003 relating to her lower back pain and for reconsideration of her testimony about the severity of her condition.

Background

Ms. Lord was 31 years old in 2005 when the ALJ found her ineligible for disability insurance benefits under the Social Security Act. She applied for disability insurance benefits on July 19, 2002, and claimed to suffer from lower back pain associated with degenerative disc disease. R. 38-41, 89. Ms. Lord claims that these impairments disabled her, within the meaning of the Social Security Act, after May 29, 2002, the last day she held gainful employment (as a school bus aide). See R. 39, 110, 417.

I. Medical Evidence Prior to November 6, 2003

Ms. Lord has a history of lower back pain. As early as February 27, 2001, she reported lower back pain that radiated to her left buttocks and left thigh. R. 161. On July 6, 2001, Dr. John Dimar diagnosed a herniated disc at L4-L5 on the left and recommended a round of conservative treatments. A follow-up exam on September 28, 2001 noted that Ms. Lord did not respond favorably to the conservative treatments and confirmed the need for surgery. R. 261. Dr. Dimar referred Ms. Lord to Dr. John Harpring, who performed a left unilateral discectomy at L4-L5 on October 3, 2001.¹ R. 264.

¹Approximately two weeks after this surgery Ms. Lord applied for disability insurance benefits. That claim was denied and not appealed. See, *e.g.*, R. 35, 17.

Following the 2001 discectomy, Ms. Lord appeared to be getting better. She still complained of back pain and left leg numbness and pain, but reported some relief of her symptoms. See R. 313-14. She still had some pain, but it was not severe enough that she wished to consider physical therapy. R. 316. Dr. Harpring advised Ms. Lord to “avoid strenuous jobs to delay any further degeneration and degenerative disease of the lumbar spine.” *Id.* That advice was consistent with Ms. Lord’s status as a post-operative patient.

II. *Medical Evidence After November 6, 2003.*

At least as early as November 6, 2003, Ms. Lord began complaining of renewed lower back pain. Dr. Harpring saw Ms. Lord again on that date and she complained of worsening lower back pain and left leg numbness. Ms. Lord wanted to avoid another surgery, and Dr. Harpring prescribed physical therapy. R. 349. On January 8, 2004, Ms. Lord reported that the physical therapy was ineffective, and she complained of “increasing progressive low back pain.” Dr. Harpring prescribed a series of epidural blocks, which were also ineffective. R. 350-51.

On July 8, 2004, Ms. Lord went to a hospital emergency room and was given a pain shot for her lower back discomfort. R. 407-08. The following week, on July 14, 2004, Ms. Lord saw Dr. Harpring again and reported that her lower back pain persisted with radicular pain down her left leg. He noted that Ms. Lord’s pain was worse with any type of activity. R. 351.

On August 19, 2004, Ms. Lord reported continued lower back radiculopathy.² Evaluating a recent MRI, Dr. Harpring dictated that he found “evidence of fairly large free fragment herniated disc, which migrate inferiorly on the left L4-L5, which I believe account for her symptoms.” Ms. Lord elected to undergo another back surgery. R. 408. Dr. Harpring’s note dated August 24, 2004 indicated that surgery was scheduled for August 30, 2004, and he instructed Ms. Lord to not return to work until “cleared from surgery.” A follow-up appointment was scheduled for September 23, 2004. R. 409. The record here does not show whether the surgery was in fact performed.

Ms. Lord also claimed disability because of symptoms of depression, an injury to her wrist, knee pain and abdominal pain. On judicial review, Ms. Lord does not challenge the ALJ’s findings on those issues.

III. *Testimony at the Hearing*

Ms. Lord applied for disability insurance benefits on July 19, 2002. R. 11H. Her claim was denied initially and on reconsideration. Upon her request, a hearing was held before Administrative Law Judge Sarah J. Miller on August 5, 2004, a few weeks after the emergency room visit, but about two weeks before the appointment that led to the scheduled surgery. George Parsons testified as a vocational expert. *Id.*

²Radiculopathy is a disorder of the spinal nerve root associated with numbness and pain. *Stedman’s Medical Dictionary* 1484 (26th ed. 1995).

When asked about the severity of her pain, Ms. Lord testified that on an average day with medication, it was a seven on a scale of one (no pain) to ten (worst pain imaginable). R. 420. Ms. Lord testified that on bad days she experienced a pain level of nine on a scale of one to ten with the aid of medication. R. 421. She also testified that she has “at least four” of those days a week and that the medication “somewhat” helps. *Id.* She also testified that she began taking Hydrocodone, a narcotic pain medication. R. 418.

IV. *Procedural History*

The ALJ issued her decision denying benefits on February 8, 2005. See R. 11E-R. The Appeals Council denied further review of the ALJ’s decision, R. 11A-C, so her decision is treated as the final decision of the Commissioner. See *Smith v. Apfel*, 231 F.3d 433, 437 (7th Cir. 2000); *Luna v. Shalala*, 22 F.3d 687, 689 (7th Cir. 1994). Ms. Lord filed a timely petition for judicial review. The court has jurisdiction in the matter under 42 U.S.C. § 405(g).

The Statutory Framework for Determining Disability

To be eligible for disability insurance benefits, a claimant must establish that she suffers from a disability within the meaning of the Social Security Act. To prove disability under the Act, the claimant must show that she was unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment that could be expected to result in death or that

has lasted or could be expected to last for a continuous period of not less than 12 months. 42 U.S.C. § 423(d). Ms. Lord was disabled only if her impairments were of such severity that she was unable to perform work that she had previously done and if, based on her age, education, and work experience, she also could not engage in any other kind of substantial work existing in the national economy, regardless of whether such work was actually available to her. *Id.*

This standard is a stringent one. The Act does not contemplate degrees of disability or allow for an award based on partial disability. *Stephens v. Heckler*, 766 F.2d 284, 285 (7th Cir. 1985). Even claimants with substantial impairments are not necessarily entitled to benefits, which are paid for by taxes, including taxes paid by those who work despite serious physical or mental impairments and for whom working is difficult and painful.

The implementing regulations for the Act provide the familiar five-step process to evaluate disability. The steps are:

- (1) Has the claimant engaged in substantial gainful activity? If so, she was not disabled.
- (2) If not, did the claimant have an impairment or combination of impairments that are severe? If not, she was not disabled.
- (3) If so, did the impairment(s) meet or equal a listed impairment in the appendix to the regulations? If so, the claimant was disabled.
- (4) If not, could the claimant do her past relevant work? If so, she was not disabled.

- (5) If not, could the claimant perform other work given her residual functional capacity, age, education, and experience? If so, then she was not disabled. If not, she was disabled.

See generally 20 C.F.R. § 404.1520. When applying this test, the burden of proof is on the claimant for the first four steps and on the Commissioner for the fifth step. *Young v. Barnhart*, 362 F.3d 995, 1000 (7th Cir. 2004).

Applying the five-step process, the ALJ found that Ms. Lord satisfied step one because she had not engaged in substantial gainful activity since her alleged onset date of disability. At step two, the ALJ found that Ms. Lord suffered the severe impairments of “degenerative disc disease of the lumbar spine and diabetes mellitus.” At step three, the ALJ found that Ms. Lord failed to demonstrate that any of her severe impairments met or equaled any listed impairment. At step four, the ALJ found that Ms. Lord was not disabled within the meaning of the act because she was able to perform her past relevant work as a general office clerk. The ALJ also considered Ms. Lord’s residual functional capacity at step five and found that she retained the residual functional capacity to perform work as a receptionist/information clerk, a filing clerk and as a telemarketer.

Standard of Review

“The standard of review in disability cases limits . . . the district court to determining whether the final decision of the [Commissioner] is both supported by substantial evidence and based on the proper legal criteria.” *Briscoe v.*

Barnhart, 425 F.3d 345, 351 (7th Cir. 2005), quoting *Scheck v. Barnhart*, 357 F.3d 697, 699 (7th Cir. 2004). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Diaz v. Chater*, 55 F.3d 300, 305 (7th Cir. 1995), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971). To determine whether substantial evidence exists, the court must “conduct a critical review of the evidence,’ considering both the evidence that supports, as well as the evidence that detracts from, the Commissioner’s decision” *Briscoe*, 425 F.3d at 351, quoting *Lopez v. Barnhart*, 336 F.3d 535, 539 (7th Cir. 2003); see also *Zurawski v. Halter*, 245 F.3d 881, 888 (7th Cir. 2001). The court must not attempt to substitute its judgment for the ALJ’s judgment by reweighing the evidence, resolving material conflicts, or reconsidering facts or the credibility of witnesses. *Cannon v. Apfel*, 213 F.3d 970, 974 (7th Cir. 2000); *Luna v. Shalala*, 22 F.3d 687, 689 (7th Cir. 1994). Where conflicting evidence allows reasonable minds to differ as to whether a claimant is entitled to benefits, the court must defer to the Commissioner’s resolution of that conflict. *Binion v. Chater*, 108 F.3d 780, 782 (7th Cir. 1997).

A reversal and remand may be required, however, if the ALJ committed an error of law, *Nelson v. Apfel*, 131 F.3d 1228, 1234 (7th Cir. 1997), or based her decision on serious factual mistakes or omissions. *Sarchet v. Chater*, 78 F.3d 305, 309 (7th Cir. 1996). This determination by the court requires that the ALJ’s decision adequately discuss the relevant issues: “In addition to relying on substantial evidence, the ALJ must also explain her analysis of the evidence with

enough detail and clarity to permit meaningful appellate review.” *Briscoe*, 425 F.3d at 351, citing *Herron v. Shalala*, 19 F.3d 329, 333-34 (7th Cir. 1994). Although the ALJ need not provide a complete written evaluation of every piece of testimony and evidence, *Schmidt v. Barnhart*, 395 F.3d 737, 744 (7th Cir. 2005), a remand may be required if the ALJ has failed to “build a logical bridge from the evidence to her conclusion.” *Steele v. Barnhart*, 290 F.3d 936, 941 (7th Cir. 2002).

Discussion

Ms. Lord has chronic degenerative disc disease. Her surgery in October 2001 was somewhat effective to reduce her pain and discomfort, leading her surgeon to advise her to avoid strenuous work, not all work of any kind. See, *e.g.*, R. 281-86, 316, 320-22. By November 6, 2003, however, more severe pain was recurring, and conservative treatments were not effective. The record is unclear and incomplete as to whether she had additional surgery and whether it was effective. The ALJ erred by failing to consider a line of medical evidence relating to the progressive nature of Ms. Lord’s back pain and by failing to consider Ms. Lord’s testimony about her daily activities from November 6, 2003 onward when evaluating the credibility of her complaints of pain.

I. Discussion of the Relevant Lines of Evidence

The ALJ erred in her analysis of Ms. Lord’s back pain because the ALJ did not sufficiently discuss all of the relevant medical evidence related to her left lower

back and leg pain. Specifically, the ALJ erred by failing to discuss or consider the findings of the emergency room physician from Ms. Lord's July 8, 2004 visit and by failing to discuss or consider Dr. Harpring's dictation from Ms. Lord's August 19, 2004 visit, without offering reasons for rejecting these pieces of evidence.

The ALJ must base her decision upon consideration of all relevant evidence, and the reasons for her conclusion must be stated in a manner sufficient to perform an informed review. *Briscoe*, 425 F.3d at 351. The ALJ is required to discuss all relevant lines of evidence, see *Golembiewski v. Barnhart*, 322 F.3d 912, 917 (2003), though she need not make a written evaluation of every individual piece of evidence in the record. *Dixon v. Massanari*, 270 F.3d 1171, 1176 (7th Cir. 2001). The ALJ is required to include enough discussion of the relevant evidence to provide a "glimpse into her reasoning." *Id.*

The more severe recurrence of lower back pain that Ms. Lord complained of while in the emergency room is documented at least as early as Dr. Harpring's dictations on November 6, 2003. R. 349. Following that November 2003 visit, she underwent physical therapy and epidural pain shots, but those treatments were ineffective. See R. 350-51. By August 19, 2004, Ms. Lord had elected to undergo the second surgery that she had hoped to avoid. R. 408-09. The ALJ's conclusion that Ms. Lord had not indicated that additional surgery was scheduled is not

correct. Dr. Harpring's note of August 24, 2004, indicated that surgery was scheduled for August 30, 2004. R. 409.

The ALJ erred by failing to evaluate or discuss the emergency room record from July 8, 2004. The ALJ did not mention or discuss the notes from that visit. See R. 11L-11M. In the late evening of July 8, 2004, Ms. Lord visited the Norton Hospital emergency room complaining of back pain. The ER doctor noted an impression of acute sciatica and treated Ms. Lord with a shot of Demerol, a narcotic pain medicine. R. 406-08. The fact that Ms. Lord was given a shot of Demerol is substantial evidence that her lower back pain was severe on July 8, 2004. The ALJ's opinion omits discussion of this relevant event without explanation.

Additionally, there is no sound basis for the ALJ to challenge or discount Dr. Harpring's report of MRI findings. The ALJ noted Dr. Harpring's dictation of Ms. Lord's August 19, 2004, office visit where Dr. Harpring referred to a recent MRI that showed evidence of a free fragment disc that he believed accounted for her symptoms. R. 11L. Dr. Harpring advised Ms. Lord that she might need surgery, and Ms. Lord elected to proceed, R. 408, though the record does not indicate whether the surgery was performed after the hearing and whether it was successful. The MRI that prompted Dr. Harpring to diagnose Ms. Lord with a herniated L4-L5 disc was not a part of the record, nor was any memorandum ordering such MRI or invoice for the completion of an MRI. See R. 11O. It was

unreasonable, however, for the ALJ to believe that Dr. Harpring's report on the recent MRI was suspect. Dr. Harpring is Ms. Lord's treating physician. He has no apparent reason or incentive to fabricate or intentionally misinterpret results. The ALJ should not substitute her medical determination for that of Dr. Harpring's and should not have questioned Dr. Harpring's interpretation of the MRI.

The ALJ addressed this critical line of evidence in only part of one paragraph. See R. 110. The ALJ omitted completely discussion of the July 2004 emergency room visit, and unreasonably questioned Dr. Harpring's interpretation of the July/August MRI. The ALJ's minimal discussion does not sufficiently articulate her reasons for rejecting this apparently highly relevant evidence. The ALJ has, therefore, failed to build a logical bridge from the evidence to her conclusion. *Steele*, 290 F.3d at 941; See *Herron v. Shalala*, 19 F.3d 329, 337 (7th Cir. 1994) (failure to mention an entire line of evidence prevents meaningful appellate review).

II. *Ms. Lord's Testimony and Credibility*

The ALJ found that Ms. Lord's testimony about the severity of her pain was not entirely credible. Ordinarily a reviewing court defers to an ALJ's credibility determination. *Indoranto v. Barnhart*, 374 F.3d 470, 474 (7th Cir. 2004). Absent legal error, an ALJ's credibility finding will not be disturbed unless "patently wrong." *Powers v. Apfel*, 207 F.3d 431, 435 (7th Cir. 2000); *Diaz v. Chater*,

55 F.3d 300, 308 (7th Cir. 1995). Nevertheless, the ALJ must explain adequately the reasons behind a credibility finding and must provide more than a conclusory statement that a claimant's allegations are not credible. *Brindisi v. Barnhart*, 315 F.3d 783, 787 (7th Cir. 2003). If the credibility finding is based on demonstrably wrong facts, it may not withstand review. See *Sarchet*, 78 F.3d at 309 (the reviewing court must set aside the ALJ's decision if it relies on serious factual mistakes or omissions).

According to Social Security Ruling 96-7p, the ALJ must consider several factors, in addition to current medication, when determining the credibility of a claimant's own testimony about the severity of pain. See 20 C.F.R. § 404.1529. Social Security Rulings are treated in the Seventh Circuit as binding on the Social Security Administration. *Lauer v. Apfel*, 169 F.3d 489, 492 (7th Cir. 1999); *Prince v. Sullivan*, 933 F.2d 598, 602 (7th Cir. 1991). The factors include: (1) the individual's daily activities; (2) the location, duration, frequency, and intensity of the individual's pain; (3) factors that aggravate the symptoms; (4) the effectiveness and type of medication the claimant takes; (5) treatment other than medication that the individual receives; (6) any other measures the individual uses or has used to relieve pain (*e.g.*, lying flat on her back); (7) any other factors concerning the individual's functional limitations and restrictions due to pain or other symptoms. See 20 C.F.R. §404.1529; SSR 96-7p. In this case, the ALJ's opinion addresses only factor number four, the effectiveness of medication, and failed to consider evidence of the severe limits on Ms. Lord's daily activities. See R. 422-25.

The ALJ questioned the credibility of Ms. Lord's testimony concerning the severity of her pain in light of the fact that she was not taking any narcotic pain medicine at the time. R. 110. Ms. Lord testified at the hearing, however, that she was taking Hydrocodone. R. 418. Ms. Lord was prescribed a considerable amount of narcotic and non-narcotic pain medication between November 2003 and the hearing on August 5, 2004. She received a series of epidural blocks, R. 350, at least one shot of Demerol, R. 406, and took Vicodin at least through July 7, 2004. R. 387. Ms. Lord also took Vioxx, a non-narcotic pain reliever (albeit one that has generated its own concerns since that time), throughout much of the relevant time period. See, *e.g.*, 387, 418. The ALJ's conclusion that Ms. Lord was not credible because she was not taking any narcotic pain medicine was based on a demonstrably wrong premise. The record may not reflect a prescription for a narcotic in the narrow window between July 7, 2004, and August 5, 2004, but the evidence shows that she was prescribed or received narcotic medicine from November 6, 2003, onward. The ALJ erred by discounting Ms. Lord's testimony based on the supposed absence of narcotic pain medication.

Ms. Lord testified that she is extremely limited in her daily activities. She does not play sports or go to church. R. 423. She does not shop or go to movies or dinner. *Id.* She does not cook or do dishes or laundry. *Id.* Nor does she do any kind of yard work or gardening. *Id.* She indicated that she could not bend over at the waist or stoop or squat. R. 424. She also testified that she had trouble showering and combing her hair without the aid of another person and that she

wore slip-on shoes because she could not bend over to tie regular lace-up shoes. R. 432-34. Ms. Lord stated that she could sit in one spot for about fifteen to twenty minutes and stand for about ten minutes before she would have to move because she was not comfortable. R. 424. To relieve the pain, she either lay down or walked around a bit. R. 431. She asserted that she could lift only five to ten pounds and had trouble climbing stairs. R. 424. She spends most of her day lying down. R. 430.

The ALJ omitted discussion of all of these statements, but nonetheless found Ms. Lord not credible. That finding failed to comply with SSR 96-7p and, at least in light of the medical evidence showing a significant worsening of her condition in approximately November 2003, cannot stand on judicial review. See, *e.g.*, *Steele v. Barnhart*, 290 F.3d 936, 942 (7th Cir. 2002) (“Without an adequate explanation, neither the applicant nor subsequent reviewers will have a fair sense of how the applicant’s testimony is weighed.”); *Zurawski v. Halter*, 245 F.3d 881, 887 (7th Cir. 2001) (remanding based on inadequate credibility explanation, and quoting Social Security Ruling 96-7p).

Conclusion

Ms. Lord might or might not have qualified for disability insurance benefits, and the record’s silence about a surgery scheduled for just a few weeks after the hearing is unusual. As explained above, her case needs a remand for a fresh look at Ms. Lord’s application for disability insurance benefits as to the period

beginning November 6, 2003. The denial of benefits for the period prior to that date is affirmed. Final judgment shall be issued affirming in part and remanding in part.

So ordered.

Date: June 27, 2006

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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